THE STATE GOVERNMENT OF JOHOR DARUL TA'ZIM v. JOHOR COASTAL DEVELOPMENT SDN BHD

COURT OF APPEAL, PUTRAJAYA
AZAHAR MOHAMED JCA
TENGKU MAIMUN JCA
HAMID SULTAN ABU BACKER JCA
[CIVIL APPEAL NO: J-01(IM)-255-07-2013]
26 NOVEMBER 2014

CIVIL PROCEDURE: *Security for costs – Security for plaintiff's costs – Non-compliance – Whether extension of time applied for – Whether blatant disregard of court order – Whether court could allow unless order*

The appellant ('the plaintiff') and the respondent ('the defendant') had entered into a privatisation cum development agreement ('the agreement') for a particular project. The said project, however, did not materialise. Pursuant to the agreement, the defendant filed arbitration proceedings against the plaintiff. Subsequently, the plaintiff filed an originating summons in the High Court and it was decided, *inter alia*, that (i) the defendant's claim in tort was not arbitrable; and (ii) the defendant gives security for the costs of the plaintiff in the arbitration by payment in the sum of RM3 million into court or by bank guarantee within 30 days from the date of the order ('19 June 2012 order'). The defendant failed to comply with the order and did not apply for a stay of the same. However, the defendant's solicitors wrote to the plaintiff and requested for an extension of time until 31 December 2012 to procure and furnish a bank guarantee. The plaintiff acceded to the defendant's request. In spite of the extension of time, the defendant failed to furnish the security for costs. This led the plaintiff to file an application to strike out the arbitration proceedings on the ground that the defendant had failed to comply with the 19 June 2012 order for payment of security for costs within the stipulated time. Nearly one month after the hearing, *ie*, on 10 June 2013, the Judicial Commissioner ('JC') held, *inter alia*, that the court did not have the power to strike out the arbitration proceedings under O. 18 r. 19(1) of the Rules of Court 2012. However, the JC ordered that the arbitration proceedings be permanently stayed unless the defendant paid the sum of RM3 million into court within seven days from the date of the order, *ie*, 10 June 2013. Aggrieved, the plaintiff appealed to this court. It was argued that the JC was wrong in failing to grant a permanent stay of the arbitration proceedings even after it was found that the defendant had wilfully breached 19 June 2012 order.

Held (allowing appeal)
Per Azahar Mohamed JCA delivering the judgment of the court:

(1) A person against whom an order of court has been issued was duty bound to obey that order until it is set aside. The defendant did not invoke the court's powers or even orally apply for an extension or

A enlargement of time. The JC erred when he enlarged the time by almost one year to comply with the 19 June 2012 order in light of his findings that the defendant had offered no plausible or credible explanation for the breach of the order and the non compliance was in wilful and blatant disregard of the order. The JC should not be astute to find excuses for
B such failure since obedience to order of the court was the foundation on which its authority is founded. (paras 15, 16 & 18)

(2) The defendant's non-compliance was contumacious in disregarding the 19 June 2012 order. The defendant had more than sufficient time to comply with the said order but chose not to do so. Under the
C circumstances, the JC ought to have ordered a permanent stay of the arbitration proceedings without qualification. The High Court has power under s. 13(6)(a) of the Arbitration Act 2005 to order security for costs against a party. However, if that party failed to comply with such an order, the court could order a permanent stay of his claims in the
D arbitration thereby debarring him from pursuing or defending his claims. As such, the JC's order was set aside. (paras 17, 20 & 21)

Bahasa Malaysia *Translation Of Headnotes*

Perayu ('plaintif') dan responden ('defendan') telah memasuki satu perjanjian
E penswastaan dan pembangunan ('perjanjian') bagi suatu projek. Walau bagaimanapun, projek tersebut tidak dapat disempurnakan. Berikutan perjanjian itu, defendan telah memfailkan prosiding timbang tara terhadap plaintif. Di Mahkamah Tinggi, plaintif telah memfailkan saman pemula dan adalah diputuskan, antara lain, bahawa (i) tuntutan denfendan dalam tort tidak boleh diputuskan melalui timbang tara; dan (ii) defendan perlu
F memberi jaminan kos plaintif dalam timbang tara dengan membayar jumlah sebanyak RM3 juta kepada mahkamah atau melalui jaminan bank dalam masa 30 hari dari tarikh perintah ('perintah 19 Jun 2012'). Defendan gagal untuk mematuhi perintah itu dan tidak memohon untuk penangguhan. Walau bagaimanapun, peguamcara defendan telah menulis kepada plaintif dan
G memohon untuk lanjutan masa sehingga 31 Disember 2012 untuk mendapatkan dan memberikan satu jaminan bank. Plaintif membenarkan permintaan defendan. Walaupun lanjutan masa diberikan, defendan masih gagal untuk memberi jaminan kos tersebut. Ini menyebabkan plaintif memfailkan permohonan untuk membatalkan prosiding timbang tara atas
H alasan bahawa defendan telah gagal untuk mematuhi perintah 19 Jun 2012 bagi bayaran kos jaminan dalam masa yang diperuntukkan. Kira-kira sebulan selepas pendengaran, iaitu, pada 10 Jun 2013, Pesuruhjaya Kehakiman ('PK') memutuskan, antara lain, bahawa mahkamah tidak mempunyai kuasa untuk membatalkan prosiding timbang tara di bawah A. 18 k. 19(1) Kaedah-
I Kaedah Mahkamah 2012. Walau bagaimanapun, PK memutuskan bahawa prosiding timbang tara akan ditangguh dengan tetap kecuali jika defendan membayar jumlah sebanyak RM3 juta kepada mahkamah dalam masa tujuh hari dari tarikh perintah, iaitu 10 Jun 2013. Terkilan, plaintif merayu ke

mahkamah ini. Adalah dihujahkan bahawa PK gagal untuk membenarkan penangguhan tetap bagi prosiding timbang tara walaupun selepas mendapati bahawa defendan telah memungkiri perintah 19 Jun 2012 dengan sengaja.

Diputuskan (membenarkan rayuan)
Oleh Azahar Mohamed HMR menyampaikan penghakiman mahkamah:

(1) Adalah tanggungjawab seseorang di mana perintah mahkamah telah dikeluarkan terhadapnya untuk mematuhi perintah tersebut sehingga ia diketepikan. Defendan tidak membangkitkan kuasa mahkamah atau memohon secara lisan untuk satu lanjutan masa. PK terkhilaf apabila masa dilanjutkan selama hampir setahun bagi mematuhi perintah 19 Jun 2012 berikutan dapatannya bahawa defendan tidak memberikan sebarang penjelasan munasabah bagi kemungkiran perintah dan ketidakpatuhan tersebut adalah disengajakan dan suatu pengabaian yang jelas. PK tidak sepatutnya mencari alasan bagi kegagalan sebegitu memandangkan pematuhan perintah mahkamah adalah asas bagi kuasanya.

(2) Ketidakpatuhan defendan adalah suatu penghinaan dalam mengabaikan perintah 19 Jun 2012. Defendan mempunyai masa yang mencukupi untuk mematuhi perintah tersebut tetapi memilih untuk tidak berbuat demikian. Dalam keadaan ini, PK sepatutnya memerintahkan supaya prosiding timbang tara ditangguhkan secara tetap tanpa sebarang syarat. Mahkamah Tinggi mempunyai kuasa di bawah s. 13(6)(a) Akta Timbang Tara 2005 untuk memberikan perintah jaminan kos terhadap sesuatu pihak. Walau bagaimanapun, jika pihak tersebut gagal untuk mematuhi perintah tersebut, mahkamah boleh membuat keputusan bagi penangguhan tetap tuntutannya dalam timbang tara dengan menghalangnya daripada melanjutkan atau membela tuntutannya. Oleh itu, keputusan PK diketepikan.

Case(s) referred to:
Dorval Tankers Proprietary Ltd v. Two Arrows Maritime and Port Services Ltd and Pakistan Edible Oils Corporation Ltd [1984] 2 Lloyd's Rep 563 ***(refd)***
Gan Boon Kyee v. Yap Hong Sin & Anor [1997] 3 CLJ 822 CA ***(refd)***
Re Jokai Tea Holdings Ltd [1993] 1 All ER 630 ***(refd)***
Richco International Ltd v. International Industrial Food Co [1989] 1 All ER 613 ***(refd)***
Wee Choo Keong v. MBf Holdings Bhd & Anor And Another Appeal [1993] 3 CLJ 210 SC ***(refd)***

Legislation referred to:
Arbitration Act 2005, s. 13(6)(a)

For the appellant - Ishak Sahari (M Pathmanathan & Shirin Pathmanathan with him); State Legal Adviser, Johor
For the respondent - Farah Shuhadah Razali; M/s Zul Rafique & Partners

[Appeal from High Court, Johor Bahru; Originating Summons No: 24M-171-2011]

Reported by Kumitha Abd Majid

JUDGMENT

Azahar Mohamed JCA:

[1] This is an appeal by the State Government of Johor Darul Ta'zim ("the plaintiff in the High Court") against the decision of the learned Judicial Commissioner ("JC") of the High Court Johor Bahru given on 10 June 2013 granting Johor Coastal Development Sdn Bhd ("the defendant in the High Court") a further seven days from 10 June 2013 to comply with the order of court dated 19 June 2012.

[2] For convenience and ease of reference, we will refer parties in this judgment as in the manner they were referred to in the High Court that is to say as the plaintiff and the defendant as the case may be.

[3] The material background facts and the relevant court proceedings leading up to this appeal are these. On 3 April 1993, the plaintiff and the defendant entered into a privatisation cum development agreement (the "agreement") for the development of a Waterfront City at Johor Bahru, along the Johor Straits, facing Singapore. The project, however, did not materialise.

[4] On 30 May 2005, the defendant had filed arbitration proceedings against the plaintiff pursuant to the agreement. Subsequently, the plaintiff took out an originating summons ("the OS") dated 21 June 2011 against the defendant, seeking, among others, the following orders:

(a) A declaration that the alleged claim in tort for conspiracy against the plaintiff is not within the scope of the arbitration clause (cl. 13) embedded in the agreement made between the plaintiff and the defendant and that it is not an arbitrable matter;

(b) A declaration that the tribunal has no jurisdiction to entertain or hear the claim for the alleged tort of conspiracy;

(c) An injunction to enjoin the defendant from pursuing or prosecuting the claim in tort for conspiracy against the plaintiff;

(d) The defendant give security for the plaintiff's costs in the arbitration in the sum of RM20 million by payment into court or by a bank guarantee and pending the giving of such security all further proceedings in the arbitration be stayed.

[5] On 19 June 2012, the learned JC handed down his decision in respect of the plaintiff's OS which are, among others, as follows ("19 June 2012 order"):

(a) A declaration that the defendant's claim in tort is not arbitrable; and

(b) That the claimant in the arbitration ie, the defendant do give security for the costs of the plaintiff in the arbitration in the sum of RM3 million by payment into court or by a bank guarantee by a Malaysian bank within 30 days from the date of the order.

[6] The 30 days deadline to comply with 19 June 2012 order expired on 18 July 2012. The defendant failed to comply with the said order for security for costs and also did not apply for a stay of the same.

[7] On 23 November 2012, ie, more than five months after the deadline to comply with 19 June 2012 order, the defendant's solicitors wrote to the plaintiff requesting an extension of time until 31 December 2012 to procure and furnish a bank guarantee.

[8] On 19 December 2012, the plaintiff wrote to the defendant's solicitors acceding to the defendant's request as follows:

> 2. Kindly let us have the Bankers Guarantee as per our draft dated 19 November 2012 OR pay the sum of RM3 million into Court by 31 December 2012.

[9] In spite of the extension of time, the defendant still failed to furnish the bank guarantee or pay the sum of RM3 million into court.

[10] This then led the plaintiff to file its notice of application dated 9 January 2013 ("the application") to strike out the arbitration proceedings wherein the plaintiff sought for the defendant's claim against the plaintiff in the arbitration proceedings arising from the agreement be struck out and dismissed, on the ground that the defendant has failed to comply with 19 June 2012 order *vis-à-vis* payment of security for costs within the stipulated time.

[11] The application was fixed for hearing on 9 May 2013 before the learned JC, during which the defendant's solicitors produced a cheque for RM3 million which they undertook to pay into court. The important point to note is that the said cheque was subsequently dishonoured.

[12] After hearing parties in respect of the application on 9 May 2013, the learned JC reserved his decision. Nearly one month after the hearing that is on 10 June 2013, the learned JC handed down his decision as follows:

> Decision
>
> It is clear that Defendant/Respondent has failed to comply with the Order of Court dated 19.06.2011. The non-compliance is in wilful disregard of the order. Court does not have the power to strike out the arbitration proceedings under O. 18, r. 19(1) ROC 2012. The Court has power to impose sanctions for non-compliance with its order, *inter-alia*, to order stay of arbitration proceedings for non-compliance.
>
> The Court imposes an unless order on the Defendant to comply with its order for security of costs within seven days from the date of this order, failing which a permanent stay of the arbitration proceedings will take effect forthwith. Costs of RM5,000.00 to the Plaintiff/Applicant.

[13] As we have indicated earlier, aggrieved by the decision of the learned JC, the plaintiff appealed to this court.

[14] Before us, learned counsel for the plaintiff submitted that the learned JC was plainly wrong in failing to grant a permanent stay of the arbitration proceedings even after finding that the defendant had wilfully breached the 19 June 2012 order ordering the defendant to either pay the sum of RM3 million into court or furnish a bank guarantee for the RM3 million within 30 days as security for the plaintiff's costs in the arbitration proceedings.

[15] On the factual matrix of the present case, we found merit in the submission of learned counsel for the plaintiff. In addressing this issue, it is pertinent we highlight an important fact. The defendant itself did not invoke the court's powers or even orally apply for an extension or enlargement of time. Yet, the learned JC on his own motion ordered that the arbitration proceedings be permanently stayed unless the defendant paid the sum of RM3 million into court within seven days.

[16] It is established law that a person against whom an order of court has been issued is duty bound to obey that order until it is set aside. It has to be said that order of court cannot be disregarded with impunity. It is not open for the person to decide for himself whether the order was wrongly issued and therefore does not require obedience. His duty is one of obedience until such time as the order may be set aside or varied. Any person who fails to obey an order of court runs the risk of being held in contempt with all its attendant consequences (see: *Wee Choo Keong v. MBf Holdings Bhd & Anor And Another Appeal* [1993] 3 CLJ 210; [1993] 2 MLJ 217).

[17] It is quite plain to us that the defendant's non-compliance was contumacious in disregarding 19 June 2012 order. In this regard, it is also relevant to note that the law assists the vigilant and not the indolent (see: *Gan Boon Kyee v. Yap Hong Sin & Anor* [1997] 3 CLJ 822).

[18] In our judgment, the learned JC erred when he on his own accord enlarged the time by almost one year to comply with 19 June 2012 order in the light of his clear findings of fact that the defendant "had offered no plausible or credible explanation for the breach of the order", and "the non-compliance was in wilful and blatant disregard of the order for which sanctions would be justified". The learned JC, in our view, should not be astute to find excuses for such failure since obedience to order of the court is the foundation on which its authority is founded (see: *Re Jokai Tea Holdings Ltd* [1993] 1 All ER 630).

[19] We agree with the submission of learned counsel for the plaintiff that where a litigant has breached a court order for which he has offered no explanation and, more importantly, where he has not sought, prayed or pleaded in court for an enlargement of time, it is not the duty or function of the court to be generous or gracious and grant a further unless order.

[20] In our judgment, the defendant had more than sufficient time to comply with 19 June 2012 order but chose not to do so. Under the circumstances, the learned JC ought to have ordered a permanent stay of the

arbitration proceedings without qualification. The High Court has power under s. 13(6)(a) of the Arbitration Act 2005 to order security for costs against a party and if that party failed to comply with such an order, the court could order a permanent stay of his claims in the arbitration thereby debarring him from pursuing or defending his claims (see: *Richco International Ltd v. International Industrial Food Co* [1989] 1 All ER 613 and *Dorval Tankers Proprietary Ltd v. Two Arrows Maritime and Port Services Ltd and Pakistan Edible Oils Corporation Ltd* [1984] 2 Lloyd's Rep 563).

[21] Based on all the abovementioned reasoning, we had allowed the plaintiff's appeal by setting aside the order of the learned JC that the defendant be given seven days from 10 June 2013 to comply with 19 June 2012 order. We further ordered that the arbitration proceedings be stayed permanently. The defendant to pay costs to the plaintiff in the sum of RM10,000.